(2)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2001

No. 01-798

FREDERICK J. HEAD, WARDEN,
Petitioner,

versus,

LARRY ROMINE,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to decide whether a state court decision is "contrary to" federal constitutional law pursuant to 28 U.S.C. §2254(d) when the Warden asserts and the federal court finds that the state court did not apply federal constitutional law?

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For the reasons set forth herein, Larry Romine respectfully opposes petitioner's request for certiorari review by this Court.

STATEMENT OF THE FACTS

In 1982, Petitioner, Larry Romine, was convicted of the murders of his parents and sentenced to death. After the Georgia Supreme Court reversed Mr. Romine's death sentences, a resentencing trial was held in 1986. Mr. Romine was

again sentenced to death. The issues raised before this Court relate to the 1986 resentencing.

The evidence presented at the resentencing indicated that Mr. Romine's parents were deeply religious people who strictly raised Mr. Romine in the Ludville Church of God in Pickens County, Georgia. Mr. Romine was active in the Church of God into his twenties, had been called to preach and minister to others, and then rejected the Christian values so synonymous with his upbringing. (T2-211-2114, 2591-2597). Picking up on the religious aspects of the evidence, the prosecutor made remarkably inflammatory statements during his closing arguments. Showing a photograph of the body of Mr. Romine's mother the prosecutor argued:

> I apologize for showing those pictures again, but you need to see that and realize what's there. This is the debris we're talking about. He splattered his mother's living tissue, her heart still throbbing, pumping, under the excitement of her adrenaline flowing. She's living for some two to fifteen more minutes and it sprays it all over that picture of the Last Supper of Christ sitting with the disciples. You know, this home, this home that he'd grown up in where Christian values were preached and taught and that's the only-- that's the reason he shot them, one of the reasons, that they were too strict.

(App. 17).

After asserting that Mr. Romine killed his parents because of their strict Christian beliefs and after arguing Mr. Romine had desecrated a sacred religious object in the process, the prosecutor went even further and offered the jury, in his closing sally, an emotional exhortation of scripture that mandated imposition of the death penalty in this case:

> I ask you, ladies and gentlemen, to go out there and render a verdict that speaks the truth, and that is one that complies not only with the law of man, the law of God and when the counsel asks you . . . whether there is a Biblical basis for the death penalty and about turning the other cheek, uh, I want to submit to you Matthew 15, verse 4. And this, you know, is New Testament stuff. That's where it says turn the other cheek too. 'For God said, respect your father and your mother. And whoever curses his father or his mother is to be put to death.' Now, curses, it's a – interpret the Greek word for curses, in the amplified version it goes beyond curses and it says abuses or treats improperly. And, uh, in Exodus 21:15, anyone who hits his mother or father should be put to death. So all of those things, hit, harm, abuses, mistreats, shall be put to death.
>
> And, uh, there's no where in the New Testament where it eradicates the law. The Lord came to fulfill the Law, not to change it or abolish it.
>
> If you go all the way back, if you go all the way back to . . . [the] Fifth Commandment, it's the first commandment that has a promise to it. And that is to honor your mother and father. You respect them, in order that your days may be long upon this earth. And if you violate that, you subject yourself to the possibility of not living as long as you might have lived. And I submit

to you that the penalty should fit the crime. According to whether you curse your father, hit your father, abuse your mother, mistreat her, or shoot her in the chest from four feet away.

Leviticus 20 verse 9, the Lord gave the following regulation: 'Anyone who curses his father or his mother shall be put to death.' He is responsible for his own death.

So when counsel gets up here and tells you that you are pulling the switch in a case that if you wait five or ten years, there might be new evidence, uh, he's responsible for his own death. He killed his parents, I submit to you. You're not pulling the switch. You're just carrying out your duty. You took an oath to abide by that duty. Life for life, bone for bone, eye for eye.

And, uh, we just submit to you folks that there is a Biblical basis for all of our laws. It's there. You can trace it back. For those of you, no matter how you've answered the question on voir dire, don't worry about it because if you want to – by the way I point out that I may have been out of the courtroom at the time, but I don't know that we opened, uh, court with prayer and pledge of allegiance, but I submit to you, that perhaps that would be a – I don't know that that's appropriate, but the suggestion is there. You may want to pray about that and be sure you're doing the right thing and ask for some guidance.

Because you don't ignore totally what's in this book just because we're asking you to be the judge of the law and the facts because you take that common sense with you back there.

(App. 17-19).

The prosecutor made his closing argument first, followed by the defendant. The State did not get a rebuttal argument. Thus, the State's argument was not made in response to a defense request for mercy based on the Bible. Defense counsel did not respond to the Biblical argument in his closing argument and the trial court did not mention the Biblical argument in its charge.

The instructions of the trial court did not cure the harm done by the improper closing argument. In fact, by instructing the jury that they were "the judges of both the law and facts," the trial court compounded the prejudice caused by the argument. (App. 20). By giving this instruction, the trial court gave the jurors the freedom to choose the law they wished to apply, including the Biblical law cited to them by the prosecutor. Thus, when coupled with the prosecutor's closing argument, this instruction gave the jury permission to disregard the law of the State of Georgia and, instead, apply Old Testament law.

In addition, while the trial court instructed the jurors that the closing arguments were not evidence, in the next breath the court told the jurors "you can accept in whole or in part the arguments of either of the attorneys or you can reject it entirely." (App. 20, n.10). By not correcting the Biblical argument after it was made and then telling the jurors that they could accept the entire argument of counsel, the trial court allowed the jury to apply Biblical law rather than post-

Furman capital punishment law. Again, this aggravated rather than mitigated the harm arising from the prosecutor's argument.

The injurious and prejudicial impact of the prosecutor's argument is heightened in this case because religion permeated the resentencing trial. To begin with, the jurors were not sequestered at a motel. Instead, they were sequestered and lodged for the entire trial at a Baptist Assembly at Burnt Mountain, Georgia. (App. 35). Because the trial ran over a weekend, several jurors wanted to treat Sunday afternoon as an ordinary workday. The judge, however, insisted on treating Sunday as a day of religious rest for the sequestered jurors. He arranged for the jurors to receive their Bibles and instructed the jurors not to go to church away from the Assembly. Instead, he suggested that it could be arranged for "Brother Caylor," the person in charge of the Assembly, to gather them all together in a room at the Assembly and give them a "good sermon."[1] (App. 35). The judge also told the jurors that they should "attend church in the sense that [they] either read [their] own Bible or either watch [church] on television [on Sunday] morning." (T2-2213).

The resentencing jury deliberated for two full days and did not return a verdict until after they were given an Allen charge. (App. 23). During

[1]It is unclear from the record whether the sermon took place.

deliberations, one of the jurors, Linda Judkins picked up the Bible that was used to swear witnesses and looked up a verse quoted by the prosecutor. (App. 22). Another juror argued to Ms. Judkins, who was a holdout for a life sentence, that the Bible mandated the death sentence in this case. (App. 21).

ARGUMENT

The Court should refuse to grant certiorari because Mr. Romine's case involves a limited, unique, fact-based holding that does not present the issue that the Warden purports to raise -- whether state court's merits decisions that are "silent" on federal law are still entitled to deference under 28 U.S.C. §2254(d).

A. This Case Involves a Limited Fact-based Holding That Does Not Present the Issue Raised by the Warden

The Court of Appeals vacated Mr. Romine's death sentence because the prosecutor's closing argument was so improper that it rendered Mr. Romine's death sentence fundamentally unfair in violation of the Fourteenth Amendment. The Court of Appeals addressed the merits of the claim, under the "contrary to" provision of §2254(d), as a result of two key positions taken by the Warden. First, the Warden conceded that the Georgia Supreme Court did not apply federal law in its decision. (App. 27). Second, the Warden waived any procedural bar to the federal court's consideration of the merits of the Federal claim. (App. 25). In light of these two positions taken by the Warden, the Court of Appeals properly reviewed this claim without deferring to the state court as there was no state court decision to which to defer and there was no procedural bar to the consideration of the claim.

The deference standard of 28 U.S.C. §2254(d)(1) applies to "any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. §2254(d). With the Warden's concession that the state court did not apply federal constitutional law to the Biblical closing argument claim, according to the plain language of the statute, the heightened deference standard of §2254(d)(1) does not apply.

Ordinarily, the Warden's position that the federal claim was not raised and considered in State court would prevent federal consideration of the claim. A federal claim that is not raised or addressed in the state court is procedurally barred under the exhaustion doctrine. Vasquez v. Hillary, 474 U.S. 254 (1986). However, because of the Warden's waiver of any procedural bar on the federal constitutional claim, Mr. Romine's closing argument ground was properly before the federal courts for decision on the merits.

As a result of these two positions taken by the Warden, Mr. Romine's federal constitutional claim based on the Biblical closing argument was properly before the federal courts for review on the merits and there was no state court decision to which the federal court could defer. Thus, it was proper for the Court of Appeals to decide the merits of Mr. Romine's claim as it did under the contrary to provisions of §2254(d).

The typical case where the "silent" state court record question will arise is one in which the federal constitutional claim is raised and decided in the state court but the decision does not contain any explanation. See e.g. Sellan v. Kuhlman, 261 F.3d 303 (2nd Cir. 2001); Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000)(en banc); Aycox v. Lytle, 196 F.3d 1174 (10th Cir. 1999); James v. Bowersox, 187 F.3d 1143 (8th Cir. 1999). This is the context in which the circuit courts are regularly dealing with the issue asserted by the Warden. Based on the unique facts of Mr. Romine's case and the concessions by the Warden, the issue is not present here. Mr. Romine's case is not a situation where the State court failed to explain its decision. It is a case where the State court did not apply federal law at all. The contrary to analysis done by the Eleventh Circuit was therefore appropriate.

The Eleventh Circuit has said as much in its recent opinion in Wright v. Secretary of Department of Corrections, 278 F.3d 1245 (11th Cir. 2002). In Wright, the Court of Appeals made clear that it had not addressed the "silent" record issue in Romine. Describing Romine, the Court wrote:

> In that case, it was unclear whether the federal constitutional issue had been raised and decided in the state court — we expressed "grave doubt" that it had been — and the attorneys representing the state insisted that the state court had not addressed the federal issue. Id. at 1365. In those circumstances, we held that no

> deference was due the state court's decision of the federal constitutional issue for the simple reason that the state court probably had not decided it. Id. We would not defer to that which did not exist.

Wright, 278 F.3d at 1254. The Court of Appeals went on to find that, in Wright, the federal constitutional issue was presented and decided in the state court even though the state court did not explain the decision. Id. With this silent record, the Eleventh Circuit held that deference was appropriate under §2254(d). Id at 1255.

As the Eleventh Circuit explained in Wright, the question presented by Petitioner is not present in Mr. Romine's case. Therefore, Certiorari should be denied.

B. There Is Not a Significant Conflict in the Circuits

The Warden asserts that the Court "should grant certiorari to resolve the conflict among the circuits on whether a state court decision that is silent as to Federal law warrants deference" under §2254. Petition at 5. While there may be a minor conflict in the circuits, it is not as serious as the Warden asserts. With the Eleventh Circuit's opinion in Wright, six circuits have held that deference is appropriate with a silent state court record. See e.g. Sellan v. Kuhlman, 261 F.3d 303 (2nd Cir. 2001); Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000)(en banc); Aycox v. Lytle, 196 F.3d 1174 (10th Cir. 1999); James v. Bowersox, 187 F.3d 1143 (8th Cir. 1999), Delgado v. Lewis, 181 F.3d 1087, 1091 n.3 (9th Cir. 1999)

cert. granted and judgment vacated on other grounds, 528 U.S. 1133 (2000).[2] One circuit has held that no deference is required. Hameen v. Delaware, 212 F.3d 226 (3rd Cir. 2000). The Sixth Circuit has taken differing positions in two different cases. Compare Doan v. Brigano, 237 F.3d 722, 730-731 (6th Cir. 2001) with Harris v. Stovall, 212 F.3d 940, 943 n.1 (6th Cir. 2000). Thus, while there may be a conflict, it is not particularly significant. Moreover, the Eleventh Circuit has made clear that the issue over which there is a conflict in the circuits is not present in Romine. Wright, 278 F.3d at 1254.

While the issue presented by the Warden is not present in Mr. Romine's case, the cases cited above demonstrate that it is being addressed regularly in the circuit courts. As a result, there are many cases that will be coming to this Court that will truly present the silent state court record issue in a clear and direct manner. For example, Sellan v. Kuhlman, 261 F.3d 303 (2nd Cir. 2001), clearly presents the issue of how to handle a silent state court record in a case in which "whether AEDPA deference applies here is all but outcome-determinative." Sellan, 261 F.3d at 310. In addition, this issue will be addressed by the en banc Fifth Circuit in Neal v. Puckett. Thus, a case such as Sellan or Neal would

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[2]In Neal v. Puckett, 239 F.3d 683 rehearing en banc granted 264 F.3d 1149 (5th Cir. 2001) the Fifth Circuit adopted the majority position. However, the Fifth Circuit has decided to rehear the case en banc.

provide a more appropriate vehicle for the Court to address the "silent" state court record question than Mr. Romine's case.

C. A Basis for Relief that Avoids the Question Presented by the Warden Exists in this Case.

Even if the Court were to reject the Warden's concession and conclude that the federal claim based on the Biblical closing argument was in fact decided in the Georgia Supreme Court, the state court decision is "contrary to" Federal Constitutional law as determined by this Court. In other words, Mr. Romine is entitled to relief without regard to the question of how to deal with a "silent" state court record. Therefore, granting certiorari is inappropriate.

In addressing the closing argument issues raised on direct appeal, the Georgia Supreme Court refused to reverse writing that

> having examined the state's closing argument in its entirety, we conclude that nowhere did the prosecutor seriously overstep his bounds. We find no reversible error. See Davis v. State, 255 Ga. 598(16), 340 S.E.2d 869; Cook v. State, 255 Ga. 565(12C), 340 S.E.2d 843(1986); Ford v. State, 255 Ga. 81(8i), 335 S.E.2d 567 (1985); Walker v. State, 254 Ga. 149(14), 327 S.E.2d 475 (1985); Spivey v. State, supra, 253 Ga. 187(4), 319 S.E.2d 420.

Romine v. State, 256 Ga. 521, 350 S.E.2d 446, 456 (1986) (App. 127).

In its opinion, the Eleventh Circuit wrote that "we have grave doubts that the Georgia Supreme Court applied federal law at all, let alone governing law set

down in Supreme Court decisions. Failure to apply that Governing law (or the same rule in state law) is tantamount to applying a rule that contradicts governing law, for these purposes." Romine v. Head, 253 F.3d at 1365 (App. 28).

Even assuming arguendo that the State Court decided the federal issue, there can be no question that the Georgia Supreme Court did not apply the correct federal law and its decision is therefore contrary to federal constitutional law. The cases cited by the Georgia Supreme Court hold that in analyzing an improper closing argument, "we [the Georgia Supreme Court] only determine whether the argument, considered in its entirety, was so prejudicial or offensive, or involved such egregious misconduct on the part of the prosecutor as to require reversal of the death sentence on the basis that it was impermissibly influenced by passion, prejudice, or any other arbitrary factor." Spivey v. State, 253 Ga. at 191, 319 S.E.2d at 427. By applying this rule, the Georgia Supreme Court did not apply clearly established federal law.

The federal standard used to judge closing argument claims is whether "prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Donnelly v. DeChristoforo, 416 U.S. 637 . . . (1974)" Darden v. Wainwright, 477 U.S. 168, 180 (1986). However, where a specific federal constitutional right — such as the Eighth Amendment

right to an individualized sentencing determination — is jeopardized by the prosecutor's closing argument, the standard is much lower. See Caldwell v. Mississippi, 472 U.S. 320 (1985).

Specifically, this Court has explained that "when specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." Donnelly, 416 U.S. at 643. Following this rule in Caldwell, this Court concluded that "in this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated." Caldwell, 472 U.S. 341. This is the clearly established federal law that is applicable to Mr. Romine's Biblical closing argument claim. This is a substantially less onerous standard for a criminal defendant than the Spivey standard used by the Georgia Supreme Court. As a result, the Georgia Supreme Court's decision is contrary to federal law.

There can be no question that in Mr. Romine's case, the prosecutor's Biblical closing argument gutted the Eighth Amendment requirement of an individualized sentencing. By telling the jury that Biblical law mandated the

death sentence and that the jurors were both the judges of law and fact, the prosecutor told the jury that they were able to apply Biblical law that was contrary to the Eighth Amendment. "It was as though the prosecutor sought to overrule, as far as this jury was concerned, Roberts (Harry) v. Louisiana, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977)(holding mandatory death penalty unconstitutional), Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)(same); Roberts (Stanilaus) v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976)." Romine v. Head, 253 F.3d 1349, 1366 (App. 30). A Biblically required death sentence is clearly "not post-Furman capital punishment law." Id. at 1368 (App. 33). As the prosecutor's argument substantially undercut the Eighth Amendment, it is clear that Caldwell is the controlling Supreme Court authority and that Mr. Romine is entitled to relief.

By applying its own Spivey standard instead of the proper Caldwell standard, the decision of the Georgia Supreme Court was "contrary to . . . clearly established Federal Law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). This situation in Mr. Romine's case parallels that faced by this Court in Williams v. Taylor, 529 U.S. 363, 120 S.Ct. 1495 (2000).

In Williams, the Virginia Supreme Court applied the standard of Lockhart v. Fretwell, 506 U.S. 364 (1993) to an ineffective assistance of counsel claim rather

than the correct standard of Strickland v. Washington, 466 U.S. 668 (1984). By applying the incorrect federal law, the action of the Virginia Supreme Court was "contrary to"clearly established Supreme Court law. Similarly, by applying the strict Spivey standard to Mr. Romine's case rather than the Caldwell standard, the action of the Georgia Supreme Court was also contrary to Supreme Court law.

Thus, were this Court to reject the Warden's concession and the Eleventh Circuit's finding that the Georgia Supreme Court failed to decide the federal claim, the Georgia Supreme Court opinion could be interpreted as applying the wrong legal standard, like the Virginia Supreme Court did in Williams. As such, Mr. Romine's would still be entitled to relief under the "contrary to" standard of §2254(d), without regard to the silent state court record question presented by the Warden. As a result, the court should not grant certiorari.

CONCLUSION

Based on concessions made by the Warden below, this is a unique fact-based case that does not present the question raised by the Warden. Moreover, as there is basis for resolving the case in Mr. Romine's favor that completely avoids the issue presented by the Warden, this case is inappropriate for resolving the question presented. Therefore, Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon counsel for petitioner by depositing a copy of same in the U.S. mail, with proper postage affixed thereto, addressed to:

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This 4th day of March, 2002.

Brian Mendelsohn